Supreme Court, U.S.
FILED
SEP 27 1996
CLERK

No. 95-1441

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,
Petitioner,

v.

CATHY FREESTONE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY TO PETITIONER'S OPPOSITION ON MOTION TO REMAND OR TO DISMISS

MARSHA S. BERZON *
SCOTT A. KRONLAND
ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
Counsel for Respondents
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

CASES	Page
American Foreign Service Association v. Garfinkel, 490 U.S. 153 (1989)	10
Blackfeet Tribe v. Jessup, 85 F.3d 465 (9th Cir. 1996)	4
Boston Firefighters Union v. Boston Chapter, NAACP, 461 U.S. 477 (1983)	9
Bryan v. Austin, 354 U.S. 933 (1957)	10
Burton v. United States, 196 U.S. 283 (1905)	2
Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979)	1
Foley v. Blair & Co., 414 U.S. 212 (1973)	9
Fort Belknap Indian Community v. Montana, 84 F.3d 1222 (9th Cir. 1996)	4
Irvine v. California, 347 U.S. 128 (1954)	3
Izumi Seimitsu Koguo Kabushiki Kaisha v. U.S. Phillips Corp., 510 U.S. 27 (1993)	3
Jean v. Nelson, 472 U.S. 846 (1985)	2
Johnson v. New York State Educational Department, 409 U.S. 75 (1972)	9
Lewis v. Continental Bank Corp., 494 U.S. 472 (1990)	10
Maine v. Thiboutot, 448 U.S. 1 (1980)	1, 3
Montana v. Fort Belknap Indian Community, 116 S.Ct. 1410 (1996)	4
Natural Resources Defense Council v. California Department of Transportation, —— F.3d ——, 1996 U.S. App. LEXIS 24316 (9th Cir. 1996)	4
Ohio Agricultural Commodity Depositors Fund v. Mahern, 116 S.Ct. 1441 (1996)	4
Oklahoma Tax Commissioner v. Chickasaw Nation, 115 S.Ct. 2214 (1995)	9
Oklahoma v. Ponca Tribe, 116 S.Ct. 1410 (1996)	4
Patterson v. McLean Credit Union, 491 U.S. 164 (1989)	2
Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)	2
Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996)	3, 4

TABLE OF AUTHORITIES—Continued

	Page
Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101 (1944)	2
Spokane Tribe v. Washington State, 91 F.3d 1350 (9th Cir. 1996)	4
Suter v. Artist M., 503 U.S. 347 (1992)	*passim*
Three Affiliated Tribes etc. v. Wold Engineering, 467 U.S. 138 (1984)	2
United States Department of Treasury v. Galioto, 477 U.S. 556 (1986)	10
United States v. New Jersey State Lottery Commission, 420 U.S. 371 (1975)	9
University Of Houston v. Chavez, 116 S.Ct. 1667 (1996)	4
Washington v. Spokane Tribe, 116 S.Ct. 1410 (1996)	4
Welch v. Texas Department of Highways etc., 483 U.S. 468 (1987)	2
Wilder v. Virginia Hospital Associate, 496 U.S. 498 (1990)	*passim*
Yee v. Escondido, 503 U.S. 519 (1992)	9

STATUTES

Social Security Act, Part IV, 42 U.S.C. § 601 *et seq.*	*passim*
§ 602(a)(2)	5
§ 602(a)(27)	5, 6, 7, 8
§ 603(h)	7
§ 509(a)(8)	7
§ 652(a)(4)	6, 9
42 U.S.C. § 1983	*passim*
Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Reconciliation Act), Pub. L. No. 104-193, 110 Stat. 2105	*passim*
§ 101	5
§ 103(a)(1)	7

REPLY TO PETITIONER'S OPPOSITION ON MOTION TO REMAND OR TO DISMISS

It has been common ground in this case that, under the analysis mandated by this Court's decisions in *Wilder v. Virginia Hospital Assoc.*, 496 U.S. 498 (1990) and *Suter v. Artist M.*, 503 U.S. 347 (1992), the viability of plaintiffs-respondents' 42 U.S.C. § 1983 case turns on the specifics of part IV of the Social Security Act, 42 U.S.C. § 601 *et seq.* In our Motion we demonstrated that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("Reconciliation Act"), Pub. L. No. 104-193, makes substantial changes to a number of the part IV provisions that all concerned have regarded as pertinent to the *Wilder/Suter* analysis. (Petitioner's opening Brief on the Merits discusses at length these now-superseded provisions. Pet. Br. at 12-23.)

Petitioner's response ("Pet. Resp.") does not in its essence take issue with that showing. Instead, petitioner urges (Pet. Resp. at 6-10) that this Court retain jurisdiction, leap over the existing *Wilder/Suter* analysis for deciding when a plaintiff may bring suit under § 1983, and go directly to a constitutional question—whether "the Eleventh Amendment precludes a § 1983 cause of action against state officials to enforce the provisions of Title IV-D of the Social Security Act" (Pet. Br. at i, 23)—and to a question that would require the Court to overturn a sixteen-year old decision that itself relied on years of precedent and that is the direct antecedent of *Wilder* and *Souter*, among other of this Court's cases—"whether *Maine v. Thiboutot*, 448 U.S. 1 (1980) . . . should be reconsidered. . ." (Pet. Br. at i, 30).[1] Yet, petitioner con-

---

[1] Petitioner's Response states that petitioner seeks only to "limit" *Maine v. Thiboutot*. Pet. Resp. at 9. Petitioner's Brief, though, makes quite clear that petitioner is seeking to have the Court overrule the exact holding of *Thiboutot*, based on the exact same arguments addressed at length by the opinions of the Court in *Thiboutot*. Pet. Br. i, 30, 35, 37-44, 44-48; *see Thiboutot* as well as *Chapman*

cedes that in the end remand may well be necessary to allow the courts below to apply the *Wilder/Suter* analysis and determine whether there is a cause of action under § 1983 for statutory violations of part IV-D of the Social Security Act, as amended by the Reconciliation Act. Pet. Resp. at 7 n.4.

1. This response, we submit, asks this Court to invert two of its most basic decisional rules:

First, "[i]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283, 295 (1905). " 'This is a fundamental rule of judicial restraint' " (*Jean v. Nelson*, 472 U.S. 846, 854 (1985), *quoting Three Affiliated Tribes etc. v. Wold Engineering*, 467 U.S. 138 (1984)), and, indeed, the "one doctrine more deeply rooted than any other in the process of constitutional adjudication" (*Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105(1944)). Thus, "[*p*]*rior* to reaching any Constitutional questions, federal courts must consider nonconstitutional grounds for decision." *Jean v. Nelson*, *supra*, at 854 (emphasis supplied), quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981).

The consideration of whether to overturn precedent is, as well, a last resort in light of the strong *stare decisis* policies favoring stability and predictability in the law. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-57 (1992) (joint opinion of O'Connor, Kennedy, Souter); *Welch v. Texas Dept. of Highways etc.*, 483 U.S. 468, 494 (1987).[2]

---

v. Houston Welfare Rights Organization, 441 U.S. 600 (1979); *id.* at 623 (Powell, J., concurring); *id.* at 646 (White, J., concurring), canvassing the same materials petitioner now presents again.

[2] These policies, as this Court had reason to repeat the last time it considered overturning a long-standing precedent construing one of the post-civil war civil rights statutes, are particularly strong where statutory issues are involved. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

Thus, contrary to petitioner's supposition, in the normal course—that is, had there been no statutory change—the Court would address petitioner's "broad issues", if at all, *after*, not before, deciding how the case comes out under the existing precedents that stress the statutory-specific nature of the § 1983 inquiry. *See, e.g., Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996) (deciding to reconsider a case holding that Congress had the power to abrogate a state's sovereign immunity to suit only after deciding first whether Congress intended in the Indian Gaming Regulatory Act to abrogate a state's sovereign immunity to suit).

Second, neither of the "broad issues" petitioner now wants the Court to decide in order to avoid considering the impact of the statutory changes worked by the Reconciliation Act were included in the Question Presented in the Petition for Writ of Certiorari. *See* Motion at 1, quoting the original Question. Far from calling for the complete abandonment of settled law, the Question Presented in the Petition invokes "this Court's precedents." Pet. at i.

In fact, neither the Petition itself nor petitioner's Reply to the Brief in Opposition to the Petition for Writ of Certiorari ("Cert. Reply") cites *Maine v. Thiboutot at all*. This Court's certiorari procedures are not intended to permit petitioners to establish jurisdiction by stealth over issues not raised in the petition. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 34 (1993), *quoting Irvine v. California*, 347 U.S. 128, 129 (1954) (plurality opinion) ("we continue to strongly 'disapprove the practice of smuggling additional issues into a case after we grant certiorari.' ")[3]

---

[3] Had the petition raised the question of reconsidering *Maine v. Thiboutot* as a separate Question Presented, respondents could have presented at that juncture the *stare decisis* considerations counseling against revisiting *Thiboutot*, and the Court could then have determined whether to grant certiorari on that particular question. *See Izumi Seimitsu, supra*, 510 U.S. at 32 n.6, *quoting Irvine v.*

As to the Eleventh Amendment question, while petitioner in its Cert. Reply did cite an Eleventh Amendment case, *Seminole Tribe of Florida v. Florida, supra,* it did so not to raise any Eleventh Amendment issue but, instead, to bolster an argument concerning statutory interpretation of part IV-D under the existing § 1983 framework. *See* Cert. Reply at 7 ("this shows congressional intent to allow the States the greatest amount of flexibility . . . . *See Seminole Tribe of Florida v. Florida* . . ."). Again, there is nothing in the certiorari papers asking that certiorari be granted to decide an Eleventh Amendment question.[4]

California, 347 U.S. at 129-30 (plurality opinion) (emphasis supplied) ("The issues here are fixed by the petition unless we limit the grant, as frequently we do to avoid *settled*, frivolous or state law questions.")

[4] Had the certiorari papers raised an Eleventh Amendment issue implicating the matters covered in *Seminole*, the Court would have had the opportunity to consider whether to remand the case to the Ninth Circuit for the purpose of assessing the impact of *Seminole*, as the Court in fact did with six other court of appeal cases on its certiorari docket in which the appellate court's decision had been issued prior to *Seminole*. *See University Of Houston v. Chavez*, 116 S.Ct. 1667 (1996); *Ohio Agricultural Commodity Depositors Fund v. Mahern*, 116 S.Ct. 1411 (1996); *Oklahoma v. Ponca Tribe*, 116 S.Ct. 1410 (1996); *Montana v. Fort Belknap Indian Community*, 116 S. Ct. 1410 (1996); *Jessup v. Blackfeet Tribe*, 116 S. Ct. 1410 (1996); *Washington v. Spokane Tribe*, 116 S. Ct. 1410 (1996). We recognize that petitioner maintains that "to remand this case to the Ninth Circuit would be a waste of time" because that court "lack[s] . . . concern for State sovereignty." Pet. Resp. at 8 n.6. But three of the cases remanded after *Seminole* were remanded to the Ninth Circuit, and the Ninth Circuit ordered those cases dismissed on Eleventh Amendment grounds. *Fort Belknap Indian Community v. Montana*, 84 F.3d 1222 (9th Cir. 1996); *Blackfeet Tribe v. Jessup*, 85 F.3d 465 (9th Cir. 1996); *Spokane Tribe v. Washington State*, 91 F.3d 1350 (9th Cir. 1996). *See also Natural Resources Defense Council v. California Department of Transportation*, —— F.3d ——, 1996 U.S. App. Lexis 24316 (9th Cir. 1996) (analyzing under *Seminole* the question whether a suit is available under the Clean Water Act, 33 U.S.C. § 1251(e)).

In any event, petitioner is wrong in her assertion that the Reconciliation Act has no bearing on the Eleventh Amendment issue she seeks to have this Court decide. Pet. Resp. at 9. Petitioner represents that "the Reconciliation Act continues to require actions from and impose obligations on participating 'States' and their 'state agencies,' not upon State officers . . ." *Id.* While this was true of the former Social Security Act provision on which petitioner most relied in her opening Brief, 42 U.S.C. § 602(a)(27), it is *not* true of the replacement for that section contained in part IV-A of the Social Security Act ("SSA") as amended by the Reconciliation Act. That provision now requires "the chief executive officer of the State" to certify that the State will comply with part IV-D. Reconciliation Act § 101, enacting new SSA § 402 (a)(2), 42 U.S.C. § 602(a)(2), H.R. Rep. No. 104-725 (Conf. Rep.) at p. 11.[5] The changes wrought by the Reconciliation Act therefore are directly relevant to petitioner's Eleventh Amendment argument

2. As to those statutory-specific questions on which this Court did grant certiorari, the new Reconciliation Act is, as petitioner really does not dispute, likely to be of central importance in considering the parties' arguments.

Given the Response's single-minded focus on part IV-D of the Social Security Act (Pet. Resp. at 3-4), it is important to understand that while this case concerns the enforceability of the standards enacted in part IV-D, the child support services provision, the issue whether those standards are in fact enforceable has from the outset of the case involved issues at the intersection of parts IV-D *and* part IV-A. It is part IV-A that requires states to have a part IV-D program as a condition of receiving part IV-A funds, and that establishes as a penalty for failing to meet part IV-D requirements the docking of part IV-D

---

[5] Although our Motion mentioned the differences between former § 602(a)(27) and new § 602(a)(2), we did not have occasion to highlight this important change in particular.

funds. Prior to its present response, petitioner particularly emphasized this linkage and insisted that it is the critical factor in deciding the limits of state obligations with regard to part IV-D standards. And, it is two of the three sections that delineate that linkage—namely, former § 602(a)(27) and former § 652(a)(4)—that have been so substantially revised in the Reconciliation Act as to render obsolete most of the discussion in petitioner's opening Brief concerning whether parts IV-A and IV-D, read together, create rights enforceable under 42 U.S.C. § 1983, and whether Congress nonetheless intended to supersede § 1983 in enacting those parts of the SSA. Pet. Br. at 12-23; *see* Motion at 1a-2a, 3a-7a.[6]

For example, petitioner's Brief states, at a critical juncture in its argument:

> Title IV-D's requirements for services are more like those at issue in *Suter* than like the measurable dollars in *Wright* or *Wilder*. Title IV-D requires only "substantial compliance" with its requirements. *42 U.S.C. § 602(a)(27).* [Pet. Br. at 14, emphasis supplied.]

Section 602(a)(27) was a provision contained *not* in part IV-D of the Social Security Act but in part IV-A of the Act, the part of the Social Security Act completely rewritten and fundamentally altered by the Reconciliation Act. The section provided that as a condition of obtaining funding for welfare benefits, states had to promise to have a part IV-D child support program, and to "operate . . . in substantial compliance with such plan." And, petitioner's central argument under the "existing framework" for deciding whether a plaintiff can file suit

[6] Additionally, the very fact that part IV-A was fundamentally altered so as to eliminate all individual entitlements and most federal standards while part IV-D was not so altered is of great significance in determining whether Congress understands part IV-D to create statutory rights in the individuals entitled to child support services.

under § 1983 was that the only *promise* a state was required to make was to operate in "substantial compliance" with the part IV-D plan, that such promises cannot be expanded by any process of implication, and that the "substantial compliance" promise is insufficient to give rise to an enforceable individual right. Pet. Br. at 13-15.

The Reconciliation Act, however, as part of its general complete overhaul of part IV-A, eliminates § 602(a)(27) entirely. In its place, it substitutes a new provision that continues to require as a condition of receiving funds for welfare assistance that the state have a part IV-D child support services program, but does *not* limit the obligation to operating in "substantial compliance" with that program. *See* Motion at 1a-2a.

To be sure, petitioner suggests that this critical change is of no moment because there remains in the Social Security Act, as amended, the term "substantially comply" with reference to part IV-D. Pet. Resp. at 7 & App. 1. But that same reference appeared in the earlier statute as well (compare former 42 U.S.C. § 603(h) with Reconciliation Act § 103(a)(1), adding 42 U.S.C. § 609(a)(8), *see* Motion at 3a-4a) and was not mentioned much less relied upon at the critical juncture in petitioner's brief quoted above. *See also*, relying on former § 602(a)(27) and not former 603(h), Pet. App. 14a (Ninth Circuit majority opinion) & 40a (dissent); Brief *amicus curiae* of National Council of State Governments, at 3, 5, 15, 18.[7] Under the "existing framework" established by the

[7] Former 42 U.S.C. § 603(h) and present 42 U.S.C. § 609(a)(8) both pertain not to the nature of the basic undertaking made by the states in obtaining funds for welfare benefits but, instead, to the quite separate question of determining when a monetary penalty should be applied to states for failure to operate in compliance with part IV-D standards. Petitioner relied on prior § 602(a)(27) and not prior § 603(h) because it was the former section, not the latter, that circumscribed the basic state plan promise made by states in accepting part IV-A funds.

Wilder/Suter analysis, the excision of the "substantial compliance" language from the description of the basic agreement entered into by the states on accepting part IV-A funds could change the doctrinal complexion of this case in a fundamental way.

Similarly, petitioner's Brief in this Court relies heavily on the former statute's audit provision, 42 U.S.C. § 652 (a)(4), in arguing that "Title IV-D's Comprehensive Enforcement Scheme Precludes Use of § 1983." Pet. Br. at 20; *see id.* at 20-23. As the Appendix to our Motion demonstrated, that provision has been entirely revised, and other provisions pertinent to the auditing role of the Secretary have been enacted. Motion at 3a-7a. While petitioner maintains that the essential characteristics on which she relied remain, one need only read the old and the new auditing provisions to conclude that the parties could reasonably dispute whether the Secretary has as extensive mandatory auditing obligations under the new statute as under the old. *See also* Pet. Resp. at 11 (arguing that the changes in the auditing procedures between the old and the new statute are so significant that "the compliance measurement [under the new statute] has not yet been developed," and that the Secretary will have to issue regulations doing so).

There may well be counter arguments to our interpretation of the significance of the replacement of § 602(a)(27) and § 652(a)(4). Indeed, we expect that in briefing the merits of the case, whether in this Court or in the courts below, petitioner will make such arguments, including the one suggested in its Response at 7 and at Appendix A, p. 1. But those new arguments will necessarily entail substantial revision of the presentations that were made in petitioner's opening Brief. For purposes of considering whether the Court should decide this case at this time, the important question is not who is right or wrong on the merits of this and other statutory questions posed by the Reconciliation Act but whether this Court,

without benefit of any courts of appeals' views after full briefing and argument or full briefing in this Court, should consider these intensely statutory-specific questions.

3. Jumping from one extreme to the other, Petitioner also argues that if the Court will not hear her "broad arguments" *now*, the Court should remand with direction that the entire case be dismissed as moot. Pet. Resp. at 10-12. This suggestion is meritless for two reasons.

First, this is a "court of review, not of first view." *Oklahoma Tax Commissioner v. Chickasaw Nation,* 115 S.Ct. 2214, 2219 (1995), quoting *Yee v. Escondido,* 503 U.S. 519, 535 (1992) (citation omitted). If there actually were a serious question as to whether the Reconciliation Act has mooted this case, that question would best be decided in the first instance by the lower courts. That is one of the main reasons for remanding a case in light of a new legal development. *See, e.g., Boston Firefighters Union v. Boston Chapter, NAACP,* 461 U.S. 477 (1983) ("we vacate the judgment of the Court of Appeals and remand for consideration of mootness in light of 1982 Mass. Acts. Ch. 190(a) 25"); *United States v. New Jersey State Lottery Comm'n,* 420 U.S. 371, 373 (1975) ("remand[ing] to Court of Appeals so that it may consider whether the case is now moot" in light of new legislation.); *Foley v. Blair & Co.,* 414 U.S. 212, 217 (1973); *Johnson v. New York State Educational Dept.,* 409 U.S. 75, 76 (1972).

Second, the Court's "established practice" is *not*, as Petitioner claims, to direct that cases be dismissed if an intervening legal change has occurred which has mooted some or all of that case. Rather:

> in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the

> judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully. [*Lewis v. Continental Bank Corp.*, 494 U.S. 472, 482 (1990).]

See also American Foreign Service Association v. Garfinkel, 490 U.S. 153, 161 (1989); *United States Dept. of Treasury v. Galioto*, 477 U.S. 556, 560 (1986); *Bryan v. Austin*, 354 U.S. 933 (1957) (per curiam) (remanding case after enactment of new statute so plaintiffs "may amend their pleadings . . . to set forth a cause of action based on the operation of the new Act.")

CONCLUSION

For the reasons stated in the Motion and in this Reply, the Court should take notice of developments after the Petition for Certiorari was granted and consider whether to remand this case or dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

MARSHA S. BERZON *
SCOTT A. KRONLAND
ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
Counsel for Respondents
* Counsel of Record